PUBLIC PROSECUTOR v. LAI KUIT SEONG

[A.Cr.J. (Chang Min Tat J.) August 2, 1968]
[Ipoh — Criminal Appeal No. 15 of 1968]

Criminal Law and Procedure — Acquittal without defence being called — Prima facie case — Road Traffic Ordinance, 1958, ss. 36(1) and 146(1)(a).

Road Traffic — Negligence — Fact to be proved.

Negligence is a fact to be proved at all times by the prosecution. It would avoid a good deal of obsecurity of thinking if magistrates would merely decide in each case what facts have been proved.

In this case the magistrate had acquitted the accused on a charge of driving without due care and attention. At the hearing of the appeal counsel for the respondent argued that the doctrine of *res ipsa loquitur* did not apply in a criminal case.

Held, allowing the appeal: in this case the prosecution had produced a *prima facie* case against the respondent as the evidence showed that the bus had failed to negotiate a sharp right hand bend and therefore the magistrate should have called on the defence.

Cases referred to:—

(1) *Gopal Rajaram* v. *Public Prosecutor* [1940] M.L.J. 101.

(2) *Ramasamy* v. *Regina* [1955] M.L.J. 95.

(3) *Krishnan* v. *Public Prosecutor* [1948] M.L.J. 12.

(4) *Public Prosecutor* v. *Low Yong Ping* [1961] M.L.J. 306.

(5) *Simpson* v. *Peat* [1952] 1 All E.R. 447.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoff bin Chin (Deputy Public Prosecutor) for the appellant.

P. P. Dharmananda for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: This is an appeal by the Public Prosecutor against the acquittal of the respondent at the Taiping Magistrate's Court on a charge of driving without due care and attention, an offence under section 36(1) and punishable under section 146(1)(a) of the Road Traffic Ordinance, 1958. The acquittal was ordered at the close of the prosecution, without the defence being called.

The main ground of appeal was that the learned magistrate erred in holding that there was no case for the defence to answer, and it was urged that since the prosecution had proved that the bus driven by the respondent had in negotiating a sharp bend veered off the road and fallen on its side, the prosecution had raised a *prima facie* case of driving without due care and attention against the respondent and it was for the defence to raise a reasonable doubt that he was not driving without due care and attention.

In reply, counsel for the respondent-driver sought to uphold the acquittal by the learned magistrate on the ground, as stated by him that the prosecution had not adduced a *prima facie* case against the driver, had not in other words, proved the driving without care and attention but had merely relied on the doctrine of *res ipsa loquitur* to raise a case against him. Counsel submitted four Malayan cases and one English case as establishing the principle that the doctrine of *res ipsa loquitur* does not apply in a criminal case. They were (1) *Gopal Rajaram* v. *Public Prosecutor,*[1] (2) *Ramasamy* v. *Regina,*[2] (3) *Krishnan* v. *Public Prosecutor,*[3] (4) *Public Prosecutor* v. *Low Yong Ping* [4] and (5) *Simpson* v. *Peat.*[5]

For myself I should not have thought that there was any more doubt of the correctness of the contention or equally that the burden lies at all times on the prosecution and never shifts to prove the negligence of the defendant in a driving case. But there seemed to me a difference in stating the principle of the burden of proof and in the application of the doctrine of *res ipsa loquitur.* Accordingly, I reserved judgment to consider the facts of this case.

Before however dealing with them, I propose, as I must, if only out of deference to counsel for the respondent, to consider the cases cited by him.

In *Gopal Rajaram's* case, *supra,* all that the prosecution proved was the discovery by the police of a small Ford saloon lying overturned partly on the road and partly on the grass verge. The police found no signs of any skid though the defence was a skid. In convicting the driver, the magistrate drew the inference that the driver was travelling at an excessive speed in approaching the bend thereby losing control of his car. Gordon-Smith J. on appeal held that the inference was wrongly drawn. The learned judge applied what obviously was the known action of centrifugal force and held that the very fact that the car ended up not on the outside of the bend where it would inevitably have ended if it had been driven at excessive speed but on the inside of the bend would tend to show, irrespective of how the accident occurred that the speed was neither high nor excessive. He accordingly found no sufficient evidence to uphold the conviction. While reminding that:—

> "The essence of the charge is not the accident nor the damage flowing from it but the negligent driving which is the criminal offence charged".

the learned judge went on to say:—

> "It may well be that evidence as to a skid and the surrounding circumstances thereof may lead to a proper inference that it was caused by negligent driving."

In *Krishnan* v. *Public Prosecutor, supra,* the only evidence given by the prosecution was that the accused was travelling on the crown of the road coming downhill, that on seeing an approaching car 30 feet away he swerved to his left and knocked down the complainant. As pointed out by Laville J. on appeal, no attempt was made by the prosecution to elicit evidence to show the actual situation with which the

driver was faced in relation to his speed and other factors of driving and whether he got into this situation through his own or another's carelessness or rashness.

In *Ramasamy* v. *Regina, supra,* the complainant alleged he was knocked into from behind by the defendant. There would however appear, even from the prosecution evidence of another party, a cyclist, being involved in the accident and in such circumstances the magistrate called for further evidence purportedly under section 165 of the Evidence Ordinance. Spenser-Wilkinson J. held that section 165 did not apply to magistrates' courts at all and further that the mere fact that the magistrate called for such evidence would indicate that at the close of the case for the prosecution, he had some doubts as to the guilt of the defendant, and accordingly he should under our law of summary procedure have acquitted. The learned judge however commented that the evidence of negligence was upon any view of the case extremely scanty.

In *Public Prosecutor* v. *Low Yong Ping, supra,* the appeal against the acquittal of the respondent was allowed as it was ordered before the prosecution had closed its case but in considering the evidence adduced so far, Ong Hock Thye J. (as he then was) found that the prosecution had done much more than proving the mere fact of an accident.

In *Simpson* v. *Peat, supra,* the defendant had crossed the path of the oncoming cyclist when he turned right and the case was remitted to the justices with a direction to convict.

These cases go, in my mind, to show that negligence is a fact to be proved at all times by the prosecution. In the cases of *Gopal Rajaram, Krishnan* and *Ramasamy, supra,* the appellate judges found on a review of the evidence that the prosecution had not proved negligence or adduced evidence from which negligence could be inferred. In *Low Yong Ping's* case and in the case of *Simpson* v. *Peat,* the appellate court found on the evidence adduced by the prosecution that the negligence had been proved, the former case, by the tyre-marks, the latter by the crossing of the path of the oncoming cyclist in the circumstances of the accident.

If negligence is a fact at all times to be proved, it would avoid a good deal of obscurity of thinking if magistrates would merely decide in each case what facts have been proved by the prosecution. In the words of Lord Goddard C.J. in the case of *Simpson* v. *Peat*:—

> "It has often been pointed out that it is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has, no doubt, properly been applied in deciding other cases on other sets of facts."

Their duty is to come to a finding of fact and I can offer them no better advice than to quote to them these words, also from the learned Chief Justice of England:—

> "The question for the justices is: Was the defendant exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances? If he was not, they should convict. If, on the other hand, the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved."

In considering the evidence in this case the learned magistrate had noted that except for P.W.5, Lee Siew Nyak, one of the passengers in the bus, the rest of the prosecution witnesses were police personnel. He dismissed the evidence of the investigating officer P.W.2 as formal and he disbelieved P.W.5. He accordingly agreed with the submission of counsel for the defendant that since the doctrine of *res ipsa loquitur* did not apply to a criminal case, the prosecution had failed, in his words, "to establish its case beyond reasonable doubt."

With respect, I do not pretend to understand how the evidence of an investigation officer can be formal or how evidence, however formal it is, can be dismissed merely as such even though it might have, on a proper consideration, some bearing on the case. In his evidence the investigating officer had testified that at the scene of the accident, he found the motor-bus lying on its side on the left grass side-table on the road facing Ayer Kuning. The sketch plan drawn by him and his evidence showed that the bus had negotiated a sharp right-hand bend before coming to rest on its side some 66 yards away. Five photographs were taken and produced in evidence. Could it therefore be said that this evidence was formal in the sense that either it had no bearing on the case or that it was not deserving of consideration. I do not think it could be so cavalierly treated. It was evidence and it must be considered. It might of course be rejected or disbelieved for valid reasons but the magistrate had failed not only to give any reason for its rejection or his disbelief but also to consider it at all.

As for the passenger, P.W.5, she testified that it was drizzling, the driver drove fast and there was an accident. The bus tilted on its side and after that she did not know what happened. Under cross-examination, she admitted she did not drive nor did she complain of fast driving. She did not see any other vehicles, though she admitted she did not look to the front. She was talking to her friends in the bus, some of whom were at the back. In the magistrate's mind, her assessment of speed was suspect as she was then talking and her mind was not focussed on the speed and was a mere presumption drawn from the accident.

Now it is clear that speeding as a factor in deciding on the quality of the driving must be related to the conditions of the road and other

circumstances prevailing at that time and while a speed of, say, 60 miles per hour on an open straight road with a good and dry surface and in the absence of other traffic is not necessarily dangerous or even inconsiderate, negotiating a sharp bend when the road is wet and slippery calls for a speed and for such care and attention as to ensure the safe execution of the manoeuvre.

In my view, the prosecution had adduced evidence that the bus had failed to negotiate a sharp right-hand bend. It is not the case of an accident occurring to a vehicle on its proper side of the road, as would appear to be in *Krishnan's* and *Ramasamy's* cases, *supra*. It is the case of a bus going off the road in failing to negotiate a sharp bend and ending up on the grass side-table on its left where it had no real business to be. It may be that the passenger's evidence of speed is a post-factum rationalisation of the cause of the accident but in all the circumstances of the accident, I do not think it can be said that the prosecution had not raised a *prima facie* case against the respondent. Neither can I find anywhere in the grounds of decision that the learned trial magistrate had considered the one question for him to consider and that is whether the defendant was exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances. In my view, the learned magistrate had not even considered the circumstances in which the accident occurred.

The appeal is allowed and the order of acquittal set aside. The case is remitted to the learned magistrate for him to call on the defence.

Appeal allowed, order of acquittal set aside.

Solicitors: *Dharmananda & Co.*

PANG KIM GUAN v. LEE CHENG LIAM

[F.C. (Tan Ah Tah F.J., Chua & Winslow JJ.) August 8, 1968]

[Singapore—Federal Court Civil Appeal No. Y9 of 1968]

Practice and Procedure — Particulars — Particulars to be given where plaintiff claims damages for injuries received in a road accident.

Damages — Claim for, for personal injuries — Further and better particulars.

When a plaintiff claims damages for injuries received in a road accident, he must, in his statement of claim, give sufficient particulars to enable the defendant, first, to identify the accident in question and, secondly, to know what exactly is the case he has to answer. It is not sufficient to state merely the particulars of the defendant's negligence. The plaintiff must give particulars of his own situation at the time of the accident and state the circumstances under which the defendant collided with him. Particulars of a defendant's negligence do not make any sense unless and until it is known where the plaintiff was and what he was doing, i.e., whether he was in motion and, if so, the direction in which he was moving, at the time of the collision.

Where in his statement of claim the plaintiff merely stated that he was "lawfully on Jalan Besar, at or near its junction with Lorong Lalat",

Held: (1) this statement gave insufficient particulars of the case which was intended to be made against the defendant at the trial;

(2) in this case the plaintiff should indicate to the best of his recollection his position upon Jalan Besar when he was run into and knocked down. Not only should he do that but he should also say whether at that time he was standing or was in motion and, if in motion, the direction in which he was moving.

Case referred to:—

(1) *Gwee Kim Bock* v. *Singapore Glass Manufacturers Co. Ltd* [1966] 2 M.L.J. 292.

FEDERAL COURT.

T. G. Dunbar for the appellant.

T. S. Tan for the respondent.

Cur. Adv. Vult.

Chua J. (delivering judgment of the court): The plaintiff (the appellant in this appeal) claimed damages against the defendant for personal injuries and loss suffered by him and caused by the negligence of the defendant in the driving of a motor vehicle.

In his statement of claim the plaintiff pleaded, *inter alia*, that:—

"On or about the 3rd day of December, 1963, the plaintiff was lawfully on Jalan Besar, at or near its junction with Lorong Lalat in the Republic of Singapore when he was run into and knocked down by motor car No. SK. 4912 which was being driven by the defendant along Jalan Besar in the direction of Lavender Street."

The defendant applied by way of summons-in-chambers for an order that the plaintiff do serve on the defendant the following further and better particulars of the statement of claim namely:—

"The point along Jalan Besar in relation to the left side thereof facing Lavender Street where the plaintiff was when he was run into and knocked down by motor car No. SK. 4912; whether the plaintiff was moving at the time of the collision and if so the direction in which he was moving."

The summons-in-chambers came before the learned Chief Justice who granted the defendant's application.

The plaintiff now appeals against that order on the ground that the decision of the Chief Justice was wrong in law.

Now what is the function of particulars? In 30 *Halsbury* p. 18 para. 37 the following passage appears:—

"The function of particulars is to limit the generality of the allegations in the pleadings, and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case that is intended to be made against him at the trial and to have such particulars of his opponent's case as will prevent him from being taken by surprise; but a party is not entitled to an order for particulars